IN THE HIGH Court OF JUDICATURE AT MADRAS

DATED : 28.09.2006

CORAM:

THE HON'BLE MR. JUSTICE M. THANIKACHALAM

S.A.NO.340 OF 1995

Jaya Engineering Works
rep. by its Managing Partner
Selvaraj having its office
Kodikalam Village,
Tittagudi Taluk. ..Appellant./ Plaintiff

vs.

1. The Managing Director,
Tamil Nadu Industrial Investment Corporation Ltd.
No.27, Whites Road,
P.B.No.410, Madras -14.

2. The Branch Manager,
Tamil Nadu Industrial Investment Corporation,
1, Arcot Wardlane,
Annexure 3rd Floor, Bharathi Salai,
Cuddalore.

3. Ramiah
4. Kaliyamurthy
5. Royston Daniel ..Respondents./ Defendants

Appeal filed under Section 100 C.P.C. against Judgment and Decree dated 19.9.1994 in A.S.No.110 of 1993 on the file of the District Judge,, South Arcot Vallalar District, Cuddalore confirming the Decree and Judgment dated 26.3.1993 in O.S.No.145 of 1986 on the file of the Sub Judge, Vridhachalam.

For Appellant : Mr. R. Subramanian for M/s. Hema Sampath
For Respondents 1&2 : Mr. Y. Paul Doss for M/s.Sampathkumar Assts.
For Respondent-3 : Mr. K. Kannan for M/s. R. Yashod Vardharn
For Respondent-4 : Mr. D. Dorairajan
R5 : NR

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

J U D G M E N T

The plaintiff, who failed before the Courts below concurrently, is the appellant.

2. The appellant herein as plaintiff has filed the suit, for declaration that the sale of the suit properties by defendants 1 & 2 in favour of the 3rd defendant as illegal, unlawful and for permanent injunction restraining defendants 1 & 2 from delivering the suit properties to the 3rd defendant and the 3rd defendant from taking delivery of the same.

3. Brief case of the plaintiff:

(a) The plaintiff and defendants 4 & 5 commenced a partnership firm, under the name and style of "Jaya Engineering Works on 17.1.1978 at Kodikulam Village in Thittagudi Taluk. The plaintiff has to manage the business as Managing Director, as per the Partnership Deed dated 28.4.1978. The first defendant has financed to the partnership firm by hypothecating the land, plant and machineries of the plaintiff, in addition to obtaining signatures of the partners in several blank forms and letter pads.

(b) Due to non-cooperation of the partners viz., defendants 4 & 5, the plaintiff was unable to repay the loan in time, resulting foreclosure notice by the 2nd defendant. Pursuant to the notice, the 1st defendant issued a publication on 21.11.1985, in The Hindu for the sale of the hypothecated properties by way of public tender scheduled on 4.12.1985 and also informing that the properties will be exhibited, to the public on 29.11.1985. In view of the fact that the possession of the suit properties is with the plaintiff, the defendants could not exhibit the suit properties to the public on 29.11.1985.

(c) In such circumstances, the plaintiff in his individual capacity has filed a suit in O.S.No.156/1986 before the District Munsif Court, Vridhachalam for permanent injunction restraining the defendants from taking possession of the suit properties, wherein defendants 1 to 3 have filed their written statement, stating that the hypothecated properties have been sold for Rs.52,000/-, less than the market value of Rs.1,00,000/-, in favour of the 3rd defendant on 4.11.1985, which is contrary to the publication issued on 21.11.1985.

(d) As the defendants in the said suit contended that the sale price is Rs.52,000/-, the District Munsif has no jurisdiction, the plaintiff has filed the present suit for the reliefs stated above, contending that the alleged sale of the suit properties on 4.11.1985 is a concocted one created for the purpose of the case, that defendants 1 to 3 are colluding together and that the defendants

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

have no right to bring the properties for sale without taking actual possession.

4. Denying the averments in the plaint, including the capacity of the plaintiff as Managing Partner, the defendant Corporation would contend, inter alia in the written statement that the suit is barred by res judicata in view of the previous suit filed by the plaintiff in O.S.No156/86, that the suit is not maintainable as the plaintiff has no locus standi to file the suit, that since the survey number and the boundaries mentioned in the plaint are incorrect, the suit deserves dismissal, that the plaintiff himself has admitted in his letter dated 8.1.1986 about the sale proceedings and therefore, the plaintiff is estopped from questioning the sale, that since there were default in payments, the assets of the partnership firm were taken possession on 3.10.1985 by the defendants after issuing foreclosure notice on 20.9.1985, that public tender notice was issued on 20.10.1985, that in the auction held on 4.11.1985, the offer of the 3rd defendant for Rs.52,000/- was accepted, that before the transfer of the assets could take place in favour of the 3rd defendant, the plaintiff has filed O.S.No.156/86 and obtained interim injunction and prayed for the dismissal of the suit with compensatory costs, further contending in the additional written statement that plaint is undervalued and that the suit is barred by limitation as the same is not filed within one year from the date of auction.

5. The third defendant also in his written statement denying the alleged possession of the suit properties with the plaintiff and his representative capacity as Managing Partner, more or less reiterating the statements of defendants 1 & 2, would specifically contend that in pursuance of his offer being accepted in the auction sale by defendants 1 & 2, he paid a sum of Rs.39,000/-, in addition to the earnest money deposited, that having paid the entire amount, defendants 1 & 2 are bound to transfer the ownership of the plaintiff firm in his name, that the plaintiff having claimed that the value of the properties is more than Rs.1,00,000/-, he has not valued the plaint properly and prayed for the dismissal of the suit.

6. The 4th defendant also, denying the possession of the suit properties, with the plaintiff and the blank forms said to have been obtained by defendants 1 & 2, in his written statement would contend that the plaintiff has filed the suit without the consent of the other partners, that he is not liable for the loss of the firm, that in order to escape from his laches, the plaintiff is blaming the other partners and prayed for the dismissal of the suit.

7. Based upon the above pleadings, the parties went on trial before the learned District Judge, Virudhachalam. The documents produced and the evidence let in, on behalf of the plaintiff and the defendants were scanned, in order to decide the dispute between the

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

parties, which lead to the conclusion of the learned Subordinate Judge, that the plaintiff has not made out a case that he is the Managing Partner, and in this view the suit filed by the plaintiff in the capacity of Managing Partner without the consent of other partners is not maintainable; that the plaintiff is not competent to file the suit as per Section 29(5) of The State Financial Corporation Act, 1951, that the plaintiff has admitted the the auction sale held on 4.11.1985, in his letter dated 8.11.1986, that the suit ought to have been filed within one year from the date of the auction sale, whereas the suit is filed only on 16.12.1986 and hence the suit is barred by limitation, that the auction sale held on 4.11.1985 is proper and the same is not liable to be set aside, that the 3rd defendant is entitled for possession of the suit items, that the plaintiff was not in possession of the suit properties, whereas defendants 1 & 2 are in possession of the suit properties as seen from Exs.P9 to P21, that only with the concurrence of the plaintiff, the properties were brought for sale by defendants 1 & 2 and therefore, the plaintiff is not entitled to declaration and for permanent injunction, as prayed, and thus dismissed the suit with costs, rejecting the claims of the defendants that the suit is barred by res judicata holding that though the plaintiff has filed O.S.No.156/86, the same was dismissed for default and that the suit is undervalued.

8. Aggrieved by the dismissal of the suit, the plaintiff preferred an appeal before the District Judge, Cuddalore in A.S.NO.110/1993. The learned District Judge concurring with the findings of the Sub Judge, dismissed the appeal on 19.9.1994 confirming the Decree and Judgment of the trial Court, which is under challenge in this second appeal.

9. This Court while admitting the second appeal has formulated the following substantial questions of law, for determination:

> 1. Whether in law the Courts below have not failed to see that defendants 1 & 2 have not followed the mandatory provision viz., Section 31 of State Financial Corporation Act, 1961 and that the alleged sale by passing the statute is void ab initio?
>
> 2. Whether in law the Courts below ought not to have seen that the administrative action of the defendants 1 & 2 in bringing the properties to sale is unfair, unreasonable and that the Corporation is not like an ordinary money lender or bank but is purpose is to promote small and medium industries?
>
> 3. Whether in law the Courts below ought not to have seen that the properties have been sold for a

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

long as a result of collusion among the defendants?

4. Whether in law the Courts below have not failed to see that no sufficient opportunity was given to the appellant to pay back the loan?

10. Heard both sides.

11. The learned counsel appearing for the appellant, Mr.R. Subramanian would submit that despite the sale still the right of redemption in respect of the suit property is available to the owner of the property viz., the appellant/mortgagor and therefore, in view of the change of circumstances in this case viz. the plaintiff paid the amount due to the financial institution as well as paid the amount to the auction purchaser, the plaintiff is entitled to a Decree for setting aside the sale and raised the following substantial questions of law for consideration and they are :

1. Whether in law, since the mortgagor has discharged the mortgage during the pendency of the appeal, is he not entitled to the benefit of Order 34 Rule 5 C.P.C.

2. Whether in law is not the Mortgagor who has been divested of his title to the mortgaged property by a stranger, still entitled to the right of redemption in respect of the property so as to able to assert that right against the said stranger as also the mortgagee?

for which no objection has been raised by the contesting respondents, and parties were permitted to advance their arguments.

12. The learned counsel for the appellant also argued before me only on the additional substantial questions of law framed as contemplated under Section 100(4) of C.P.C. and has not advanced any arguments on the original substantial questions of law, framed by this Court on 5.4.1995. Therefore, it is unnecessary for this Court, to deal with the previous four substantial questions of law and it is suffice if we answer the additional substantial questions of law.

13. In order to appreciate and to reach an unerring conclusion, some of the factual matrix are necessary, to be recapitulated. Thiru Selvaraj, who represents the plaintiff "Jaya Engineering Works" and defendants 4 & 5 are the partners of the plaintiff company. They have obtained loan from defendants 1 & 2 for the purpose of their business offering the properties, which are the subject matter of the suit and sold in Court auction, by creating hypothecation deeds also. Unfortunately, the plaintiff has not paid the amount due to defendants 1 & 2. Therefore, defendants 1 & 2 invoking the rights available under the State Financial Corporation Act, brought the hypothecated properties for sale. In the sale held

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

on 4.11.1985, the third defendant participated in the auction, offered to pay a sum of Rs.52,000/- being the price for the land and the machineries by way of tender, which was accepted. Pursuant to the acceptance of the offer, the third defendant paid a sum of Rs.39,000/- in addition to the amount already paid viz., Rs.13,000/- as earnest money, thereby totally paying a sum of Rs.52,000/-. As stated in the written statement of the third defendant, pursuant to the auction sale, although he is entitled to have the transfer of ownership including possession, defendants 1 & 2 have neither transferred the ownership of Jaya Engineering Works nor handed over possession to the third defendant. At this stage, the plaintiff originally filed a suit on the file of the District Munsif, Virudhachalam in O.S.No.156/86 questioning the sale on the grounds of irregularity, challenging the sale. When that suit was pending, on the basis of the jurisdiction, the present suit was filed before the Sub Judge, Virudhachalam to declare the sale of the suit properties, by defendants 1 & 2 in favour of the third defendant as illegal and for injunction to restrain defendants 1 & 2 from delivering the suit properties to the third defendant.

14. Both the courts below, on appreciation of the evidence, came to a conclusion, that the suit filed to set aside the sale is barred by time, that the suit has not been filed by P.W.1 in the capacity of the Managing Partner with the consent of other partners, that the third defendant had purchased the properties in the auction for valid consideration, pursuant to the same, he became the owner of the property, that since defendants 1 & 2 are competent to invoke the State Financial Corporation Act, the suit questioning the auction is not maintainable and that the injunction sought for by the plaintiff, against the Financial Corporation as well as against the purchaser of the properties in the auction from the Financial Corporation is not maintainable, which is under challenge in this second appeal.

15. The appellant moved an application in C.M.P.No.3716 of 1995 for injunction, restraining defendants 1 & 2 from handing over the properties, which were the subject matter of sale and this Court has passed an order on 5.4.1995, which reads:

> "Mr. Yashod Varadhan takes notice on behalf of the third respondent/caveator. Interim injunction for four weeks on condition that the petitioner shall deposit before the trial Court a sum of Rs.55,000/- (Rupees Fifty Five Thousand only) in all within a period of four weeks from today, failing which the injunction granted today shall stand automatically vacated. This order is passed without prejudice and contentions of the respective parties to be agitated in the second appeal".

It seems, the appellant was unable to deposit the amount within the period fixed, which expired on 2.5.1995. Therefore, he moved

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

another application in C.M.P.No.7696/95 wherein, not only extension of time is granted, but also modifying the original order, a direction has been given to pay the amount directly to the counsel for the respondent and the order reads:

> "It is represented that the time granted by this Court expired on 2.5.1995 and the petitioner went to deposit the amount on 2.5.1995. But the Court below refused to receive the amount. Hence this application has been filed after three weeks. Counsel for the respondent raised an objection that the application has been filed after the expiry of the time granted by this Court. However, this Court has directed the petitioner only to deposit the amount of Rs.50,000/-. Instead of depositing, learned counsel for the petitioner agrees to pay the amount directly to the counsel for the respondent before this Court by tomorrow (24.5.1995), the said sum of Rs.50,000/-. Hence time is extended till day-after-tomorrow, that is 25.5.1995 and the petitioner is directed to pay the amount of Rs.50,000/- to the respondent's counsel directly by tomorrow and file the Receipt before this Court on the reopening date."

16. In the original order dated 5.4.1995, it is clarified, that the order was passed without prejudice to the rights of the contentions of the respective parties to be agitated in the second appeal. No such reservation has been made, when the modification was made as per the order dated 23.5.1995. It is not known how the amount Rs.55,000/- ordered as per the order dated 5.4.1995 was reduced to Rs.50,000/- as per the order dated 23.5.1995. However, without any murmur, when a sum of Rs.55,000/- was offered by the appellant, by way of demand draft on 24.5.1995, the same as accepted by the learned counsel for the contesting respondents, as seen from the xerox copy of the receipt, produced by the appellant, dated 24.5.1995.

17. When the second appeal was coming before the Court, as date fixed case, the parties have reported to the Court, that the matter has been settled, seeking time for reporting settlement, which could be seen from the endorsement dated 19.10.2005, in addition to another endorsement dated 23.1.2006. Pursuant to the negotiations, followed by settlement, as agreed between the parties, as submitted, a sum of Rs.70,000/- payable to respondents 1 & 2 has been paid on 31.3.2006, for which xerox of the receipt also produced, not challenged. Thus, it is seen, after the sale, though it had taken place on 4.11.1985, the parties have settled the matter in 2005 followed by 2006. By the settlement, at present, the plaintiff, who is the owner of the properties auctioned, parted away totally a sum of Rs.1,25,000/-. But, so far, the sale has not been set aside and admittedly, the auction sale also has not come to an

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

end, confirming finally, because of the prolonged litigation commencing from 1985-86 still pending. From the facts narrated above, one thing is clear that the amount payable to defendants 1 & 2 has been paid and the actual amount paid by the auction purchaser viz., the third defendant has also been paid, thereby not causing any financial loss as such, except permissible claim of interest, which I will discuss as rightly submitted by the learned counsel for the appellant.

18. On the above stated facts, Mr. R. Subramanian, the learned counsel appearing for the appellant would submit, that when the sale has not been confirmed finally and when possession is also not given to the auction purchaser, the owner is entitled to redeem the mortgage, since the redemption right has not come to an end, either by operation of law or by the acts of the parties. In this context, we have to see, because of the payments made by the Judgment debtor, the sale can be set aside, giving redemption right to the mortgagor.

19. The learned counsel for the appellant has not challenged the sale held on 4.11.1985 before me on any grounds and therefore, it should be taken, that there was a sale on 4.11.1985 as per the law. It is also an admitted fact, as could be seen from the written statement of the third defendant, no transfer of ownership has been effected by documents, in favour of the auction purchaser and possession of the properties also has not been given to the third defendant. Immediately after the sale or at least some time later before final confirmation of the sale and the transfer of interest in favour of the auction purchaser, the mortgagor filed the suit to set aside the sale and because of the continuous pendency of the proceedings, even as on this date, though more than two decades are over, the sale is not confirmed, finally.

20. Order XXXIV Rule 5 C.P.C. gives a right of redemption to the mortgagor/debtor to seek a final Decree, by paying the amount into the Court at any time before the confirmation of the sale, ordering the mortgagee to deliver the documents referred to in the preliminary Decree, ordering them to transfer the mortgaged property as directed in the preliminary Decree, in addition to put the mortgagor in possession of the property also. This right of redemption is available under Section 60 of the Transfer of Property Act also.

21. At present, the right invoked by respondents 1 & 2 under the State Financial Corporation Act 1951 is not under challenge. Based upon the following Judgment of the Apex Court it was argued, the sale or the subsequent proceedings cannot be challenged. The Apex Court has held in UP Financial Corpn. v. Naini Oxygen & Acetylene Gas Ltd. (1995 (2) SCC 754 as follows:

> "This is not a matter where the High Court should have stepped in and substituted its Judgment for the Judgment of the Corporation which should be deemed to

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

know its interests better whatever the sympathies the Court had for the prosperity of the Company.

It is further observed in the said Judgment that,

"The Corporation is an independent autonomous statutory body having its own constitution and rules to abide by, and functions and obligations to discharge. As such, in the discharge of its functions, it is free to act according to its own light. The views it forms and the decisions it takes are on the basis of the information in its possession and the advice it receives and according to its own perspective and calculations. Unless its action is mala fide, even a wrong decision taken by it is not open to challenge. It is not for the courts or a third party to substitute its decision, however more prudent, commercial or businesslike it may be, for the decision of the Corporation. Hence, whatever the wisdom (or the lack of it) of the conduct of the Corporation, the same cannot be assailed for making the Corporation liable. In matters commercial, the courts should not risk their judgments for the judgments of the bodies to whom that task is assigned."

This Judgment is not factually applicable to the case on hand, since the right contemplated under Section 60 of the Transfer of Property Act coupled with Order XXXIV Rule 5 CPC. is well available, not negatived in the above rulings.

22. The submission of the learned counsel for the third respondent, inviting my attention to a decision of the Andhra Pradesh High Court in Ch.S.K. Nagaraju vs. A.P. State Financial Corp.(1989 (3) ALT 428), that the public auction held by the Corporation is valid and binding and therefore, question of cancelling the same does not arise for consideration, is factually at present distinguishable, since the appellant is now claiming only the right of redemption not questioning the authority of respondents 1&2.

23. The learned counsel for the appellant sought the aid of a decision of the Supreme Court in Maganlal v. M/s. Jaiswal Industries, Neemach (AIR 1989 SC 2113) and demonstrated how the right of redemption is available to the debtor industry viz., the plaintiff. In the case involved in the above decision, sale of property mortgaged to Financial Corporation in execution of the order under Section 32 of the State Financial Corporations Act, as well as rights of debtor, such as whether debtor can invoke the provisions of Order XXXIV Rule 5 C.P.C. and redeem the mortgage were well considered and it is held in paragraphs 21,26,29 & 30 that the debtor would be entitled to redeem the mortgage, by depositing the decreetal dues. The relevant observations are as follows:

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

"Where the debtor-industry had filed an appeal against the order dismissing its application for setting aside confirmation of sale of properties mortgaged to the financial corporation in execution of order of sale of mortgaged properties passed under S.32 as the order of confirmation of sale had not become final due to pendency of appeal not the right of redemption of the debtor had been extinguished and the provisions of O.34 R.5 of the Civil P.C. were applicable during the course of proceeding of execution of order for sale of mortgaged property passed under S.32 the debtor would be entitled to redeem the mortgage by depositing decretal dues. There is no provision in the Act or any Rule or Order made thereunder stating that the effect of any action taken thereunder including the passing of orders of attachment and sale under Ss.31 and 32 thereof is to extinguish the right of redemption. In other words, there is nothing in the Act or in any Rule or Order made thereunder which may be inconsistent with S.60 of the Transfer of Property Act particularly the proviso thereto. Consequently no provision in the Act can be read "in derogation" of the said S.60. In this connection, it could not be said that S.32(8) of the Act made the manner provided in the Code applicable only "as far as practicable" and there was neither a Decree nor was the Financial Corporation a Decree-holder in a suit for sale but was only deemed to be a Decree-holder by legal fiction because of the expression "in execution of a Decree as if the Financial Corporation were the Decree-holder". As is apparent from the plain language of S.32(8) the legal fiction was created for the purpose of executing an order under S.32 for sale of attached property as if such order was a Decree in a suit for sale and the Financial Corporation was the Decree holder whereas the debtor was the Judgment-debtor. Consequently, the provisions of the Code of Civil Procedure with regard to execution of a Decree for sale of mortgaged property contained in O.21 of the Code including the right of file an appeal against such orders passed during the course of execution which are appealable shall apply mutatis mutandis to execution of an order under S.32 unless some provision is not practicable to be applied. It cannot be disputed that the provisions contained in O.34 R.5 of the Code are attracted as is apparent from the plain language thereof during the proceedings in execution of a final Decree for sale and are thus provisions contained in the Code with regard to and having a material bearing on the execution of a Decree as aforesaid. The provisions contained in O.34, R.5 of

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

> the Code in substance permit the Judgment-debtor to redeem the mortgage even at the stage contemplated by O.34, R.5 unless the equity of redemption has got extinguished. Since the contingency where under an equity of redemption gets extinguished is contained in the proviso to S.60 of the Transfer of Property Act and since in the instant case the equity of redemption had not extinguished there is no good ground to take the view that even though all the remaining provisions with regard to execution of a Decree for sale of mortgaged property will apply to execution of an order under S.32, the provision contained in O.34 R.5 of the Code shall not apply."

From the reading of the judgment, it is seen when the order of confirmation of sale had not become final, due to the pendency of the appeal or the right of redemption of the debtor has not been extinguished, the provisions of Order XXXIV Rule 5 of C.P.C. is well applicable, since it is to be construed that the Financial Corporation is a Decree holder, applying the provisions of the C.P.C. In the case on hand, as pointed out by me, the amount payable, not only to the Decree holder-Financial Corporation, but also the auction purchaser-third defendant, have been paid and the sale also has not reached the finality due to the pendency of the appeal. In this view of the matter, the right of redemption is available to the plaintiff mortgagor. When it is shown there is no finality in the confirmation of the sale, right of redemption should be made available, since as observed by a Division Bench of this Court in Gnanam A. v. M/s. Palaniappa & Co. and another (2001 1 L.W. 630), that right of redemption goes along with the property, even if it is sold in Court auction.

24. In Sevugan Chettiar v. V.A.Narayana Raja (1997 LW 328) a Division Bench of this has considered when the actual deposit of the money should be made, that too when the appeal is pending, considering the fact, appeal being a continuation of the trial, actual deposit of the money along with the filing of the application for setting aside sale, not necessary and it is sufficient if the deposit is made before the confirmation of the sale. It is also observed in paragraph-16 of the Judgment as follows:

> "In this case, the confirmation is yet to reach the finality. So long as there is no confirmation of sale in the eye of law and the matter is sub-judice in appeal, time is available for the Judgment-debtor to make the deposit and the process of deposit could be worked out until the confirmation of the sale reaches the finality. Deposit into Court is not a matter of course and the Civil Rules of Practice lay down the processual aspect in this behalf."

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

Applying the above principles, when the confirmation has not reached finality and considering the fact that Judgment debtor has paid the entire amount to the Decree holder as per the memo filed, it should be held that the plaintiff has availed the right of redemption, which is not extinguished.

25. It is also the dictum of the Court in the latest decision in Philomina Jose v. Federal Bank Ltd. (2006 (4) CTC 188), wherein it is held:-

> "Right of redemption of a mortgage is a substantive right of Mortgagor which has accrued to him to be exercised under Order 34, Rule 5 of the Code when the Decree was passed which cannot be taken away by the amendment of Order 34 of the Code which was made only after the Decree in this case."

It is further held that,

> "An application under Order 34, Rule 5, is maintainable until the final determination of proceedings to set aside the sale under Order 34, either by way of Appeal or Revision."

placing reliance upon a number of decisions of the Apex Court, which dictum is to be made available to the present appellant also as contemplated under Order XXXIV Rule 5 under the change of circumstances, though no such petition has been filed, but considering the fact, suit has been filed to set aside the sle, on other grounds

26. In view of the admitted facts that the auction sale in favour of the third defendant has not reached finality and the appellant exercising the right of redemption though not on so many clear terms, has deposited the amount due to the Decree holder as well as the auction purchaser, a relief should be given to the property owner and its denial may not be proper and just.

27. True, the suit is one to set aside the sale on the ground of illegality or irregularity, seeking further relief of injunction. In view of the change of circumstances during the pendency of the appeal, taking into account the subsequent events, as held by the Apex Court in Variety Emporium M/s. v. V.R.M. Mohd. Ibrahim Naina (1998 L.W. 25 SC) a lessor relief could be granted in order to render substantial justice as held by this Court in Natarajan vs. Muthukrishnan 2001 (4) CTC 513, which is within the power of this Court. By applying the strict letters of law, the substantial right of the parties, should not be the causality and when there is possibility to mould the relief, not affecting the rights of anybody to the lis, the Court is competent to grant relief, and in this view, the plaintiff should be given the relief of cancelling the auction as well as redelivery of possession, since admittedly possession has not been passed on to the auction purchaser, compensating the auction purchaser as held by the Apex Court in

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

Hindi Pracharak Prakashan v. M/s.G.K. Brothers AIR 1990 SCC 2221.

28. In Hindi Pracharak's case, the Decree has been satisfied by the deposit of the decreetal dues, giving liberty to the decreetal holder also, to withdraw the same for satisfying the Decree. It is also further seen in the case involved in the above decision that the property was sold by auction elsewhere in 1980, and the auction purchaser parted away the amount, but the sale had not been confirmed. Considering all these circumstances, as submitted by the learned counsel for the appellant, applying the rulings of the Apex Court, I am of the view that the auction purchaser is entitled to the amount deposited in the Court as also to reasonable compensation by way of interest. In this case, the amount was paid to the auction purchaser through demand draft as already recorded. Therefore, if at all from the date of deposit of the amount of Rs.52,000/-, the auction purchaser-R3 is entitled to interest as reasonable compensation as ruled in Hindi Pracharak's case, at the rate of 9 % per annum, considering the prevailing rate of interest in the Banking Sector, which the appellant is also willing to pay.

29. In the light of the above discussion and considering the material change of circumstances after the sale, as well the payment of money by the appellant, it may not be fair and just to deprive the right of the property owner/mortgagor denying his right to the property, compelling him to pay (already paid) the entire dues payable by him not only to respondents 1 & 2, but also to R3. For these reasons, I conclude the appellant is entitled to the benefit of Order XXXIV Rule 5 C.P.C. and he is entitled to the right of redemption in respect of the properties sold in the auction, since the auction sale has not reached finality, answering the additional substantial questions of law accordingly.

30. The result, therefore, is the appeal is allowed, setting aside the Decree and Judgment of the courts below granting a Decree as hereunder:

(i) The appellant/plaintiff is directed to deposit the interest due on Rs.52,000/- at 9% per annum from the date of deposit of the amount by the 3rd respondent, till the payment was made to him as per the order of this Court, deducting excess amount, if any paid over and above as per the order dated 23.5.1995 of this Court, within three months from the date of receipt of copy of this Judgment before the trial Court to the credit of O.S.NO.145/1986.

(ii) On such deposit, the third defendant is permitted to withdraw the same unconditionally.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

(iii)Upon compliance of the condition, the auction sale in favour of the third defendant dated 4.11.1985 shall stand cancelled.

(iv) Respondents 1 & 2 are directed to return the original documents of the property if deposited with them as well as to put the appellant/plaintiff in possession of the suit properties within a month from the date of the deposit as per Clause (i).

Considering the peculiar circumstances of the case and in view of the settlement reached between the parties, though not given effect to, as seen from the records, they are directed to bear their respective costs through out.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

kv

To

1. The District Judge,
   South Arcot Vallalar District,
   Cuddalore.

2. The Sub Judge, Vridhachalam.

3. The Record Keeper, V.R. Section,
   High Court, Madras.

1 cc to M/s. HEma Sampath, Advocate, Sr. 46167
1 cc to Mr.R. YAshod Vardhan, Advocate, sr. 46319
1 cc to M/s,. Sampath Kumar, Associates, Sr. 46337

WEB COPY

S.A.NO.340 OF 1995

TEJ (CO)
kk 22/12

https://hcservices.ecourts.gov.in/hcservices/